Competition Tribunal Tribunal de la Concurrence

**CT - 98 / 02**

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34,
and the *Competition Tribunal Rules*, SOR/94-290, as amended;

AND IN THE MATTER of an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER of an application by the Director of Investigation and Research for an interim order pursuant to section 100 of the *Competition Act*.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Superior Propane Inc.
Petro-Canada Inc.
The Chancellor Holdings Corporation
ICG Propane Inc.

Respondents

**ORDER REGARDING USE OF INFORMATION SUBJECT TO PRIVILEGE**

**Date of Hearing:**

December 4-6, 1998

**Presiding Member:**

The Honourable Mr. Justice Marshall Rothstein

**Counsel for the Applicant:**

**The Director of Investigation and Research**

William J. Miller
Josephine Palumbo

**Counsel for the Respondents:**

**Superior Propane Inc.**

Neil Finkelstein
Milos Barutciski
Melanie L. Aitken
Russell P. Cohen

**Petro-Canada Inc**.
**The Chancellor Holdings Corporation**
**ICG Propane Inc.**

Randal T. Hughes

**COMPETITION TRIBUNAL**

**ORDER REGARDING USE OF INFORMATION SUBJECT TO PRIVILEGE**

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***The Director of Investigation and Research***

***v.***

***Superior Propane Inc. et al.***

[1] In these proceedings under section 100 of the *Competition Act*[1] (the "Act"), the Director of Investigation and Research (the "Director") seeks to have the Tribunal, on a confidential basis, consider notes accumulated during the course of his inquiry in respect of the proposed acquisition of ICG Propane Inc. ("ICG") by Superior Propane Inc. ("Superior").

[2] The Tribunal has not seen this information. However, it is described as notes of telephone calls from persons associated with ICG. The persons are said to be "insiders" who have described events which they say have taken place during the pendency of this transaction. It is said that the information was unsolicited. It is admitted that the information is unsworn but the Director says that this is a matter that goes to weight and not admissibility. The respondents object to the information being considered by the Tribunal. They say it is highly prejudicial and they have not had an opportunity to respond to it.

[3] Initially at this hearing, the Director was prepared to disclose the information to counsel for the respondents on their undertaking that they not disclose it to their clients. Respondents'

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[1] R.S.C. 1985, c. C-34.

counsel refused to receive the information on that basis. They said they would have to discuss it with their clients so that they could prepare responses. Later in these proceedings, the Director went further and was prepared to allow the contents of the information to be disclosed to the respondents except for the names or other details that would disclose the identity of the informers.

[4] The information at issue is said to go to two fundamental aspects of a decision under section 100: first, whether the proposed merger is reasonably likely to prevent or lessen competition substantially, and second, whether any action is likely to be taken that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because the action would be difficult to reverse. If that is so, there is no doubt the information is relevant.

[5] The grounds for withholding the identity of persons who have provided the information to the Director is public interest privilege. It is well established that there is a public interest in protecting the sources of information provided to the Director in the course of his inquiries.[2] During the inquiry stage, the practice is that the Director provides summaries of the information he has obtained to the respondents. As McKeown J. stated in *Director of Investigation and Research v. Canadian Pacific Limited et al.,* the purpose of the summaries is to disclose the facts known to the Director to the respondents so that they may prepare their case.[3] For purposes of preparation, the respondents need not assess the weight or importance of the views or opinions received by the Director. However, McKeown J. states:

[3] (1997), 78 C.P.R. (3d) 421 at 425, [1997] C.C.T.D. No. 42 (QL).

> If at the hearing of the application the Director chooses to rely on a view or opinion contained in the summary, he will have waived his privilege over the information and the source of the statement will have been revealed to the respondents in a timely fashion.[4]

[6] While this is not a hearing on the merits, it is a hearing convened at the instance of the Director to obtain interim relief on an urgent basis prior to an application being filed under section 92. The Director is still not prepared to disclose the identity of the sources of the information upon which he relies to persuade the Tribunal to grant the order he seeks under section 100. This position is inconsistent with the dictum of McKeown J. in *Canadian Pacific* and that of Reed J. in *Southam*.[5] Indeed, weight and importance of the information provided by the informers is critical in the assessment to be made by the Tribunal and this goes to the identity and reliability of the sources of the information. While it might be possible to treat the information on a confidential basis, if the information is to be taken in and used by the Tribunal, privilege will be waived.

[7] There is a further. This hearing was called on short notice. The respondents have had two days of formal notice. While they were provided with the information at issue, it was forwarded in sealed envelopes to counsel, not to be opened until the proceedings before the Tribunal on December 4, 1998. This condition precluded respondents' counsel from dealing with the

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[4] *Ibid.*

[5] *Supra* notes 2 and 3.

information before today. A decision on this matter must be made prior to midnight, Sunday, December 6, 1998. Practically, even if the Tribunal were to order full disclosure of the information to counsel for the respondents, with full opportunity to discuss it with their clients, which the Tribunal would not do without the consent of the Director, there is no time for the respondents to properly prepare meaningful responses, provide them to the Tribunal and have the Tribunal consider them before a decision is required.

[8] If the Director wishes to rely upon the information in question and have the Tribunal consider it, the general rule is that this constitutes a waiver of privilege. In the circumstances here, he cannot ask the Tribunal to consider the information, but withhold portions of it from the respondents on the grounds of privilege.

[9] FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the respondents' objection is sustained, and the Tribunal will not receive this information for purposes of making its decision on this application under section 100.

DATED at Ottawa this 4th day of December, 1998.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marshall Rothstein____________

Marshall Rothstein
Marshall Rothstein